

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

LETTERS PATENT APPEAL No 136 of 2000

in

SPECIAL CIVIL APPLICATION No 3307 of 2000

For Approval and Signature:

Hon'ble MR.JUSTICE R.K.ABICHANDANI Sd/-

and

Hon'ble MR.JUSTICE D.H.WAGHELA Sd/-

- =====
1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES
YES
 2. To be referred to the Reporter or not? YES :
 3. Whether Their Lordships wish to see the fair copy of the judgement? : NO
NO
 4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO
NO
 5. Whether it is to be circulated to the Civil Judge? : NO
NO

KRUPABEN B TRIVEDI,

Versus

GOVERNMENT OF GUJARAT, SECRETARY, EDUCATION DEPTT

Appearance:

MR SB VAKIL with MR ASPI M KAPADIA for Appellant
MR SK JHAVERI for Respondent No. 1

CORAM : MR.JUSTICE R.K.ABICHANDANI
and
MR.JUSTICE D.H.WAGHELA

Date of decision: 03/05/2000

ORAL JUDGEMENT (Per: D.H.Waghela, J.)

This Letters Patent Appeal is filed to challenge the order of the learned Single Judge in Special Civil Application No.3307 of 2000 wherein, while issuing Rule, the interim relief as prayed by the petitioner is refused. The petitioner prayed for an interim relief for restraining the Government of Gujarat from implementing the orders terminating the service of the petitioner as the Gujarat Affiliated Colleges Services Tribunal and appointing another person as the Tribunal.

2. The main grounds canvassed in this appeal are that the interim relief is erroneously refused after finding an arguable case and admitting the petition. It is submitted that the ad-interim relief, if granted, would not have amounted to allowing the petition at the admission stage, because the appellant was entitled to continue in service till the age of 58 years on the basis of the Government Resolution dated 29.12.1997. It is also submitted that the impugned order terminating the service of the appellant amounted to overreaching the process of the court since it was hurriedly passed though the LPA of the petitioner was pending in this court and initially ad-interim relief was granted against the show cause notice issued to change the service conditions of the appellant and the appellant was allowed to continue in service. It was submitted that the balance of convenience was in favour of the appellant.

3. The appellant herein was appointed by the Government as the Tribunal vide order dated 12.5.1997 in exercise of the powers conferred by Sub-section (2) of Section 3 of the Gujarat Affiliated Colleges Services Tribunal Act, 1982. This order at Annexure-D to the petition did not contain any conditions of service. It appears from the record that Special Civil Application No.49 of 1997 by way of a public interest litigation had come to be filed in this Court mainly seeking to provide adequate staff, facilities and accommodation for the five education Tribunals constituted under different legislations. Several successive orders were issued in the said PIL to ensure proper working conditions in several Education Tribunals in that case. Although the grievance regarding conditions of service of the Presiding Officers of the Tribunals was not ultimately entertained, in one of the orders dated 2.12.1997, the Government Pleader was directed to make available to the

court the order fixing the pay and allowances and the service conditions of the Members of the Tribunals. Pursuant to that direction, the order dated 29.12.1997 relating to the present appellant was produced before the Court. This order fixing the terms and conditions of appointment of the appellant (Annexure-G), inter alia, stipulated that the appointment will last till the completion of the age of 58 years. This condition of appointment was fixed by the Government Resolution dated 29.12.1997. Thereafter, by the letter dated 16.4.1999, the appellant was called upon to show cause as to why the conditions of her service should not be altered in view of the Government Resolution dated 29.12.1997 being in violation of Rule 2 of the Gujarat Affiliated Colleges Services Tribunal (Terms and Conditions of Services of Persons Constituting the Tribunal) Rules, 1982, which prescribed the term of the office to be two years. The appellant was, therefore, called upon to make a representation within 21 days and, if she so desired, present her case personally on 29.4.1999. The appellant challenged the said show cause notice by way of Special Civil Application No.3569 of 1999 which was dismissed on 11.5.1999. That order dismissing the petition was challenged by way of a Letters Patent Appeal wherein a Civil Application was also filed praying for an injunction against said notice. The ad-interim injunction granted in the said Civil Application was extended upto 15.2.2000 and the main Letters Patent Appeal was taken up for admission hearing on 10.4.2000 when the respondent took up a preliminary objection that the appeal was time-barred. On 17.4.2000, the said appeal and all the companion applications were disposed of taking note of the development that, on 13.4.2000, the State Government had terminated the service of the appellant and appointed the respondent No.2 as the Tribunal. However, in view of the fact that till 13.4.2000 the appellant was in service, the order terminating the service of the appellant as well as the notification appointing the respondent No.2 were stayed upto 25.4.2000 to enable the appellant to challenge these orders by way of a substantive petition. Thus, the fresh Special Civil Application No.3307 of 2000 came to be filed by the appellant wherein the impugned order refusing interim relief is made on 24.4.2000.

3.1 During the course of hearing before the learned Single Judge, the detailed representation dated 10.5.1999 in reply to the show cause notice dated 16.4.1999 submitted by the appellant appears to have been placed on record. An affidavit on behalf of the respondent is also filed wherein it is, inter alia, stated that the

appellant had written further letters dated 21.6.1999, 22.7.1999, 11.9.1999 and later on a detailed representation dated 25.10.1999 was also submitted. It is stated that the appellant had decided not to insist upon personal hearing and the matter was to be decided on the basis of her representation supplemented by the additional detailed representation sent on 25.10.1999.

3.2 During the course of hearing of the present appeal also, an affidavit is filed on behalf of the respondent annexing therewith the representation of the appellant dated 25.10.1999. The appellant has, in her detailed representation, inter alia, contended that she was called by telephone from the office of the then Hon'ble Chief Minister of the State of Gujarat in January 1997 and was given to understand by him and other high-ranking Government officers that the State Government shall give her appointment on the same terms and conditions of service as were applied to two other education Tribunals. Those Tribunals were given the service conditions as applicable to the Judges of the Gujarat High Court and their age of superannuation was 62 years. Thus, after considering the matter and having regard to the fact that the salary and the age of superannuation and other conditions of service will be as per the service conditions of the High Court Judges, the appellant had agreed to accept the offer and thereafter appointment order dated 12.5.1997 was issued. Thereafter, by the order dated 29.12.1997, the conditions of service which were less favourable than those applicable to the Judges of the High Court were given. Upon her protest, the Additional Chief Secretary to the Education Department had promised to consider the question regarding uniform application of the terms of all the Tribunals. It is further stated that there appeared to be a politically motivated move to remove the appellant from the position as the Tribunal so as to enable the present Government to make appointment of a person of its choice. Thus, the proposal to modify the conditions of service is alleged to be mala fide, arbitrary and in violation of the provisions of Articles 14, 16 and 19 (1) (g) of the Constitution. The appellant has further represented that the service rule of two years tenure did not apply in the case of appointment from the members of Bar. It is also stated that the disparity in the tenure of service of various education tribunals was discriminatory, irrational and arbitrary. On these facts and contentions, the case is also sought to be made out before us for the grant of mandatory interim relief.

4. It would be apposite here to advert to the relevant provisions of the Act and the Rules. Sections 3, 4 and 17 of the Gujarat Affiliated Colleges Services Act, which are relevant for the present purpose, read as under:

"Sec.3: Constitution of Gujarat Affiliated Colleges Services Tribunal.-

(1) There shall be established by the State Government by a notified order a Tribunal to be called the Gujarat Affiliated Colleges Services Tribunal.

(2) The State Government shall appoint a district Judge or a person who has been or is qualified to be a Judge of a High Court or a District Court to be the Tribunal.

Explanation.- In this section the expression "District Judge" shall have the meaning assigned to that expression in Article 236 of the Constitution.

Sec.4: Term of office and conditions of service of person appointed to be Tribunal.-

The term for which the person constituting the Tribunal shall hold office and his conditions of service shall be such as may be prescribed.

Sec.17: Power of Government to make rules.-

(1) The State Government may, by notification in the Official Gazette, make rules for carrying out the purposes of this Act.

(2) Without prejudice to the generality of the foregoing power, such rules may be made for all or any of the following matters, namely:-

(a) the term for which a person constituting the Tribunal shall hold office and his conditions of service under section 4;

(b) the matters to be prescribed under clause (d) of sub-section (1) of section 10;

(c) subsistence allowance to which a college employee shall be

entitled during his suspension
and in the terms and conditions
thereof under proviso to
sub-section (5) of section 14;

(d) any other matter which is to be
or may be prescribed by the
rules.

(3) The power to make rules conferred by this
section shall be subject to the
conditions of the rules being made after
previous publication.

(4) All rules made under this section shall
be laid for not less than thirty days
before the State Legislature as soon as
may be after they are made and shall be
subject to rescission by the State
Legislature or to such modification as
the State Legislature may make during the
session in which they are do laid or the
session immediately following.

(5) Any rescission or modification so made by
the State Legislature shall be published
in the Official Gazette, and shall
thereupon take effect."

Rule 2 of the Gujarat Affiliated Colleges
Services Tribunal (Terms and Conditions of Services of
Persons Constituting the Tribunal) Rules, 1982 made in
exercise of the powers conferred by Sub-section (1) read
with Clause (a) of Sub-section (2) of Section 17 of the
Act reads as under:

"Rule 2. Term of person constituting Tribunal.-
The person constituting the Tribunal shall hold
office for a period of two years on and with
effect from the date on which he takes over the
charge of office."

5. The learned senior counsel Mr.S.B.Vakil appearing
for the appellant has vehemently argued that the
Government cannot be allowed to set up as a defence the
illegality or invalidity of its own resolution by which
the conditions of service of the appellant were fixed.
Moreover, the order terminating the service of the
appellant does not expressly indicate that the Government
has found its own resolution to be illegal and, in any

case, a proper opportunity of being heard was not afforded to the appellant before making the adverse order changing the conditions of the appellant's service and discharging her. It is further submitted that the earlier resolution dated 29.12.1997 fixing the age of retirement at 58 years for the appellant was issued after taking a conscious decision fully justified by the fact that the appellant was selected from the Bar and was not a retired Judge. Thus, in short, according to the appellant, there is a very good prima facie which requires consideration and the balance of convenience is overwhelmingly in her favour inasmuch as she had completed two years of satisfactory service and the new incumbent had at best taken the charge for a day.

6. The learned counsel relied on the following observations of Their Lordships of the Hon'ble Supreme Court in the judgment in ASSISTANT COMMISSIONER OF COMMERCIAL TAXES (ASST.) v. DHARMENDRA TRADING CO. (AIR 1988 SC 1247):

"The next submission of learned counsel for the appellants was that the concessions granted by the said order dated 30th June, 1969 were of no legal effect as there is no statutory provision under which such concessions could be granted and the order of 30th June, 1969 was ultra vires and bad in law. We totally fail to see how an Assistant Commissioner or Deputy Commissioner of Sales Tax who are functionaries of a State can say that a concession granted by the State itself was beyond the powers of the State or how the State can say so either."

It has to be noted that the aforesaid observations are made by the Apex Court in the context of the incentives which were declared under the Karnataka Sales Tax Act for entrepreneurs starting new industries in the Mysore State. The concessions granted by the order dated 30.6.1969 did not specify the power under which the order was issued but such a power was clearly found in Section 8-A of the Karnataka Sales Tax Act. It is, therefore, clearly observed that although the source of power was not stated in the order, but if it could be found in the relevant Act, the exercise of the power must be attributed to that source. In the facts of the present case, the source of power for issuing the resolution containing special conditions of service inconsistent with the Rules cannot be traced. Therefore, the ratio of the aforesaid judgment cannot be applied in facts of the present case.

7. The learned counsel for the appellant has also made a grievance that the impugned order practically decided all the issues arising in the petition in conclusive terms and the same may adversely influence the final judgment in the matter.

8. The learned senior counsel Mr.Zaveri appearing for the State Government has submitted that the resolution heavily relied upon by the appellant was clearly inconsistent with the Rules which are binding on the Government and which were known to the appellant at the time of accepting the appointment. It is further submitted that the decision to terminate the service of the appellant was taken bona fide after affording sufficient opportunity of being heard to the appellant. It is also submitted that the discretionary order of the learned Single Judge refusing to grant interim relief cannot be interfered with and should not be replaced by an order granting a mandatory relief of the nature prayed for by the appellant in the Civil Application filed in the present appeal. The learned counsel relied upon the decision in A.K.BHATNAGAR v. UNION OF INDIA [(1991) 1 SCC 544] to submit that once Rules are framed, the action in respect of matters covered by the Rules should be regulated by the Rules. Acting in a manner contrary to the Rules creates problem and dislocation and the Government should refrain from acting in a manner not contemplated by their own Rules. Relying upon the judgment of the Apex Court in WANDER LTD. v. ANTOX INDIA P. LTD. [1990 (Supp) SCC 727] followed in (1996) 5 SCC 71, it is further submitted that the appellate court should not interfere with the exercise of discretion of the court of first instance and substitute its own decision except where the discretion has been shown to have been exercised arbitrarily, or capriciously or perversely or where the court had ignored the settled principles of law regulating grant or refusal of interlocutory injunctions. If the discretion has been exercised by the trial court reasonably and in a judicial manner the fact that the appellate court would have taken a different view may not justify interference with the trial court's exercise of discretion.

9. It is further submitted, relying upon UNION OF INDIA v. ARUM KUMAR ROY (AIR 1986 SC 737) that a Government servant whose appointment though originates in a contract, acquires a status and thereafter is governed by his service rules and not by the terms of contract. It would be idle to contend that in the case of employees under the Government, the terms of the contract of

appointment prevail over the rules governing the service conditions. It is further submitted that the emoluments and service conditions of a Government servant are regulated by rules or regulations and such regulations can be imposed unilaterally without reciprocal consent. Although in the facts of the aforesaid case the powers of the Government to make the rules were derived from Article 309 of the Constitution, the underlying principle may as well apply in the facts of the present case wherein statutory rules are expressly governing the term of the office of the Tribunal in question.

10. It is also submitted that the appellant being a practising advocate at the time of appointment can safely be presumed to have accepted the appointment with full knowledge of the aforesaid Rule, especially when no mention of the age of retirement was made in the initial appointment order. According to the learned counsel for the respondent, the appellant has, in fact, made several detailed representations which were considered by the Government before taking the decision to terminate her services, and the appellant had neither insisted upon nor sought any personal hearing after 15.2.2000 when the stay operating in her favour stood vacated.

11. The facts which cannot be lost sight of at the interlocutory stage are that: (a) the resolution extending the term of the office of the appellant is clearly inconsistent with the Rules, (b) several opportunities were given to the appellant before discharging her from service and (c) on the date of the impugned order, the appellant stood discharged. Rule issued in the main petition of the appellant is made returnable on 15.6.2000 on which day it is supposed to be finally heard and, in the meantime, as stated at the Bar, the Gujarat Affiliated Colleges Services Tribunal is going to have vacation upto 11.6.2000.

12. The main controversy regarding the effect and validity of the Government Resolution dated 29.12.1997 whereby the conditions of service inconsistent with the services Rules were fixed is causing a spiral of legal proceedings without being finally resolved. Even at this stage it would again be improper for us to record a finding on any controversial facts or to pronounce on the legal issues arising in the petition while the same has to be heard and decided by the learned Single Judge. However, in order to decide whether the impugned order refusing to grant mandatory relief should be upheld or not, we have to express our opinion that, prima facie,

the aforesaid Government Resolution cannot be enforced and relied upon for the grant of interim relief of a mandatory nature for the simple reason that it prescribes the term of office upto 58 years contrary to the statutory rules which specifically fix the tenure of appointment to that post at 2 years. As observed by the Hon'ble Supreme Court in ITC BHADRACHALAM PAPERBOARDS v. MANDAL REVENUE OFFICER, A.P. [(1996) 6 SCC 634] where the field is occupied by an enactment, the executive has to act in accordance therewith. If it is found that the act done by the Government is invalid and ineffective for non-compliance with the mandatory requirements of law, it cannot be held that notwithstanding such non-compliance, it yet constitutes a promise or a representation for the purpose of invoking the rule of promissory/equitable estoppel. Accepting such a plea would amount to nullifying the mandatory requirements of law besides providing a licence to the Government or other body to act ignoring the binding provisions of law. Such a course would render the mandatory provisions of the enactment meaningless and superfluous. It falls foul of our constitutional scheme and public interest. In the context of the contract between the State and a licensee, it is observed by the Apex Court in ASSISTANT EXCISE COMMISSIONER v. ISSAC PETER [(1994) 4 SCC 104] as under:

"Doctrine of fairness or the duty to act fairly

and reasonably is a doctrine developed in the administrative law field to ensure the rule of law and to prevent failure of justice where the action is administrative in nature. Just as principles of natural justice ensure fair decision where the function is quasi-judicial, the doctrine of fairness is evolved to ensure fair action where the function is administrative. But it can certainly not be invoked to amend, alter or vary the express terms of the contract between the parties. This is so, even if the contract is governed by statutory provisions, i.e., where it is a statutory contract - or rather more so."

It is also observed by the Hon'ble Supreme Court in UNION OF INDIA v. AIR COMMODORE S.K.MISHRA (1999 SCC (L&S) 949) that it was not proper normally to direct the Department by an interim order not to retire an officer because in the event an employee succeeds in his case, he can always be granted relief even for the period during which he was out of service. Here in the facts of the present case, the learned Single Judge has, for sufficient reasons, arrived at the prima facie conclusion

that the impugned action of discharging the appellant was not mala fide or without granting her a reasonable opportunity of being heard as also regarding taking over of the charge by the respondent No.2. It is also ordered that the new appointment made under the order dated 13.4.2000 will be subject to the result of the petition.

13. Thus, considering the rival contentions and the prima facie conclusions reached by the learned Single Judge in the impugned order, we are of the view that the material on record as well as the submissions of the appellant have been duly and judiciously considered by the learned Single Judge. The apprehension of the appellant that the issues arising in the petition are all but concluded in the interim order is misconceived, as it goes without saying that such observations are made in the process of considering the prayer for interim relief at the admission stage. In view of these facts and following the observations of Their Lordships of the Hon'ble Supreme Court in WANDER LTD. (supra), we do not find sufficient reason to interfere with the impugned order.

14. This appeal is, therefore, dismissed with no order as to costs. We clarify that the main petition will be decided on merits and the observations made in the impugned order as also in this order, regarding the issues involved are confined only to the question relating to the interim reliefs prayed for by the appellant.

15. At this stage, the learned counsel appearing for the appellant submits that the ad-interim relief which has been operating till now may be continued upto 19.5.2000 to enable the appellant to approach the higher forum for appropriate relief. Having regard to the facts and circumstances of the case, it appears to us that the interim relief which is operating today should continue to remain in force till 19.5.2000 to enable the appellant to approach the higher forum in the matter. It is ordered accordingly.

(KMG Thilake)

#####